No. 13130

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT,

v.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE ROBERT DOLLAR CO., AND H. M. LORBER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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CITATIONS

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JURISDICTIONAL STATEMENT

This is an appeal by the United States from an order entered on October 3, 1951, by the United States District Court for the Northern District of California, Southern Division, granting the motion of appellees (defendants below) for summary judgment and dismissing with prejudice the complaint of the United States to quiet title to the controlling shares of stock of American President Lines, Ltd., as to which appellees are adverse claimants. The opinion and order of the court below appear at R. 282-307 and are reported in *United States* v. *Dollar,* 100 F. Supp. 881.

The court below had jurisdiction of the action under 28 U.S.C. 1345. Appellant filed its notice of appeal on

October 4, 1951 (R. 308). This court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. *The Complaint.* On March 12, 1951, appellant, the United States, filed its complaint against appellees (the Dollar defendants), American President Lines, Ltd., and its stock transfer agents, alleging that the United States is the true and lawful owner of certain shares of common stock of American President Lines which constitute approximately 92% of the voting stock, title to which the United States had acquired from appellees under an agreement entered into August 15, 1938, for the reorganization of American President Lines, which was then named Dollar Steamship Lines, Inc., Ltd. (R. 3, 6-7).

The complaint referred to the decision by the Court of Appeals for the District of Columbia Circuit in *Land* v. *Dollar,* 188 F.2d 629, as to which the Supreme Court denied a petition for a writ of certiorari on the day the complaint was filed (*Land* v. *Dollar,* 340 U.S. 948), and alleged that the United States was not a party to the *Dollar* v. *Land* litigation in the District of Columbia, was not bound or concluded by the judgment therein, and that that judgment had not divested the United States of its title to or right to possession of the stock (R. 6-8).

The complaint also alleged that the Dollar defendants claimed to own the stock and were making demands upon American President Lines and its transfer agents to have new certificates issued to them and to be registered as owners of the stock; that the stock has a unique

value; and that the wrongful claim of title by the Dollar defendants constitutes a cloud on the title of the United States (R. 8-12).

The complaint prayed for interlocutory relief and for final relief in the form of an injunction restraining the Dollar defendants from obtaining new stock certificates and from being registered as owners of the stock, a declaratory judgment that the United States is the lawful owner of the stock, and the recovery of damages from the Dollar defendants for their cloud on the title of the United States (R. 14-6).

B. *The Preliminary Injunction.* On March 19, 1951, the United States moved the court below for a preliminary injunction to preserve the status quo pending adjudication of the conflicting claims to the title to the stock by restraining the registration of the Dollars as owners of the stock (R. 56). This motion was supported by the verified complaint and by affidavits showing that because of the vital role of American President Lines in connection with military operations in Korea, even a temporary disruption of its present efficient management would create irreparable injury to the public interest (R. 64).

On March 20 American President Lines filed in the court below a motion for instructions, pointing out that it was being subjected to conflicting claims of ownership of the stock by appellant and by appellees.[1]

On March 21, 1951, the Dollars filed in the court be-

[1] The entire original record in the court below is lodged in this court, pursuant to appellant's designation (R. 312). This court has pending before it appellant's motion for permission to refer to parts of the record not printed.

low, in an action entitled *Dollar, et al.* v. *Land, et al.*, No. 30428, an application for enforcement of an order entered by the United States District Court for the District of Columbia in the *Dollar* v. *Land* litigation there (which the Dollars had registered in the court below pursuant to 28 U.S.C. 1963) and for civil contempt proceedings against a Department of Justice attorney who had filed the quiet title action of the United States and other Government officials.[2]

The court below (Harris, J.) consolidated these proceedings and on April 6, 1951, after a full hearing, filed an opinion holding that the United States was not bound by the District of Columbia litigation; that the action of Government counsel and other Government officials did not constitute contempt of court, but was, on the contrary, pursuant to their duty to protect the interests of the United States in the stock; and that in order to prevent irreparable injury, the United States was entitled to a preliminary injunction to preserve the status quo pending a final determination of the issue as to ownership of the stock. He also ordered the rule to show cause in contempt discharged (R. 134).[3] *United States* v. *Dollar*, 97 F. Supp. 50 (N.D. Cal.).

On April 11 Judge Harris entered a preliminary injunction which restrained the issuance of new stock certificates to the Dollars and their registration as owners of the stock (R. 161).

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[2] See footnote 1, page 3, supra.

[3] On April 20, 1951, the Dollars appealed to this Court from the order of Judge Harris discharging the contempt rule (Appeal No. 12,918) (R. 173). This Court still has pending before it the Dollars' motion to remand the contempt case to the district court.

C. *This Court's Denial of the Dollar Motion to Stay the Injunction Pending Appeal.* On June 22, 1951, this Court denied the motion of the Dollars for a stay of the preliminary injunction pending appeal, pointing out that fundamental issues in this litigation are before the Supreme Court in the *Dollar* v. *Land* litigation. *Dollar* v. *United States,* 190 F. 2d 547 (C. A. 9).[4]

D. *The Dismissal of the Complaint.* In May, 1951, District Judge Murphy succeeded District Judge Harris as the judge assigned to hear motions in the court below, and the Dollars on May 22 moved to dismiss the complaint and for summary judgment (R. 257). On October 3, 1951, Judge Murphy entered the order from which this appeal is taken, granting the Dollars' motion for summary judgment, decreeing that the Dollars are the owners of the stock, and dismissing the quiet title complaint of the United States with prejudice, on the ground that the United States is concluded by the *Dollar* v. *Land* litigation because Department of Justice attorneys represented the Government officials who were sued in their individual capacities in that action (R. 290-305). *United States* v. *Dollar,* 100 F. Supp. 881, 885.

E. *This Court's Grant of an Injunction Pending Appeal.* On November 20, 1951, this Court granted appellant's motion for an injunction to preserve the status quo pending appeal, stating that Judge Murphy's holding "appears at war with the repeated pronouncements of the Supreme Court that the judgments entered in

[4] On April 20, 1951, the Dollar defendants appealed to this Court from the issuance of the preliminary injunction (Appeal No. 12,917) (R. 172). On January 10, 1952, this Court dismissed that appeal.

Dollar v. *Land* would not be res judicata against the United States'' (R. 368). *United States* v. *Dollar,* 192 F. 2d — (C. A. 9).[5]

F. *Present Status of Proceedings in the Supreme Court.* On January 7, 1952, the Supreme Court denied the Dollars' petition for certiorari to review Judge Murphy's order of dismissal in advance of decision by this Court. *Dollar* v. *United States,* No. 494, October Term, 1951.

The Supreme Court now has before it writs of certiorari granted on June 4 and November 13, 1951, to review orders entered in *Dollar* v. *Land* by the District of Columbia Court of Appeals (1) restraining Government officials from defending or taking advantage of Judge Harris' preliminary injunction, and (2) holding Government officials in civil contempt for, among other things, obtaining that preliminary injunction. *Land* v. *Dollar,* 341 U.S. 737; *Sawyer* v. *Dollar,* No. 247, and *In the Matter of George L. Killion,* No. 248, October Term, 1951. These cases have not yet been set for argument.

The Supreme Court also has still pending before it a petition for reconsideration of denial of certiorari to review *Dollar* v. *Land* on the merits. *Land* v. *Dollar,* No. 353, October Term, 1950.

SPECIFICATIONS OF ERRORS RELIED ON

The district court erred:

1. In holding that the United States is concluded by

[5] On December 14, 1951, this Court entered its order enjoining the registration of the Dollars as owners of the stock, pending this appeal (R. 374).

the judgments of the District of Columbia courts in the *Dollar* v. *Land* litigation by way of res judicata or "collateral estoppel" because the Department of Justice represented the individual defendants in that litigation.

2. In disposing of the action by summary judgment, since there was a genuine issue as to a material fact to be tried—whether the parties to the adjustment agreement of August 15, 1938, intended that absolute title to the stock in controversy be transferred—and appellees were not entitled to judgment as a matter of law.

3. In granting appellees' motion for summary judgment, in adjudicating that appellees are the owners of the stock, and in dismissing the complaint.

SUMMARY OF ARGUMENT

1. The United States was not a party to *Dollar* v. *Land* and is not concluded by judgment there. It has six times been so held in that litigation, notwithstanding that the Supreme Court and the District of Columbia Court of Appeals have been well aware that the individual defendants were represented by the Department of Justice. As this Court stated in its opinion of November 20, 1951, Judge Murphy's use of "collateral estoppel" is but another way of saying res judicata.

Beginning with *Carr* v. *United States,* 98 U.S. 433, and *United States* v. *Lee,* 106 U.S. 196, the Supreme Court has held time and time again that Department of Justice representation of public officials sued as individuals cannot make the United States bound by the judgment in such suit. The Attorney General has no

authority to waive sovereign immunity even if he wished to do so, which he did not here.

2. It was error to decide this case by summary judgment, which is not to be granted where there is the slightest doubt as to the facts. Here the *Dollar* v. *Land* trial record shows that there is a substantial issue of fact as to whether the parties intended to transfer outright title to the stock.

Stare decisis may not be used to prevent the United States from showing here that the conclusion of the District of Columbia Court of Appeals as to the nature of the stock transfer was erroneous. The United States is entitled to make a new record on the trial here and it has substantial new evidence. The affidavit of Dollar counsel to the contrary was insufficient to justify summary judgment and is, moreover, demonstrably false.

Summary judgment was wholly inappropriate in a case such as this involving complex issues of public importance, with credibility of witnesses in issue and the ultimate issue of fact in sharp dispute.

ARGUMENT

I.

The United States is not concluded by the Dollar v. Land litigation by way of res judicata or "collateral estoppel" notwithstanding the fact that the Department of Justice represented the individual defendants in that litigation.

The fundamental error of the court below is its holding that because the Department of Justice represented the members of the Maritime Commission and the Secretary of Commerce, in their individual capacities, in the *Dollar* v. *Land* litigation in the District of Columbia

courts, the United States is now bound, by principles of res judicata or "collateral estoppel" from litigating in its quiet title action here the issue as to whether the United States or the Dollars are the true owners of the stock.

As this Court pointed out in its opinion of November 20, 1951, granting appellant's motion for an injunction pending appeal, Judge Murphy's holding seems to be "but another way of saying that the judgments there rendered [in *Dollar v. Land*] are res judicata as regards the claims of the government," and appears contrary to the Supreme Court's holdings in *Dollar* v. *Land* (R. 368).

The Dollars have maintained the District of Columbia litigation on the basic premise that it is not a suit against the United States, or its alter ego, the Maritime Commission, which are not and could not be made parties, but is rather an action against individual tortfeasors withholding possession of the Dollars' property. When *Dollar* v. *Land* first went to the Supreme Court on the jurisdictional question as to whether the suit was an unconsented suit against the United States, the Dollars specifically represented that it would not be res judicata against the United States.[6]

[6] In their brief in the Supreme Court the Dollars stated, "since no judgment against the United States is sought, no decision in the case will be *res judicata* with respect to the title of the United States but will only conclude the rights of the parties *inter se*" and cited the following cases specifically holding that an action by a claimant to property to recover it from a Government official is not res judicata against the Government: *United States* v. *Lee,* 106 U.S. 196; *Tindal* v. *Wesley,* 167 U. S. 204, 223; *Blondet* v. *Hadley,* 144 F. 2d 370 (C. A. 1) (Brief for Respondents in *Land* v. *Dollar,* No. 207, October Term, 1946, p. 74).

1. The Supreme Court, this Court, and the District of Columbia Court of Appeals have repeatedly held that the United States is not bound by Dollar v. Land.

The Supreme Court and the District of Columbia Court of Appeals have six times held in *Dollar* v. *Land* that judgment there would not be res judicata against the United States. Thus, in *Land* v. *Dollar,* 330 U.S. 731, 736, 737, 739, the Supreme Court, in holding that if the Dollars' allegations were proved, the action would not be one against the sovereign, three times stated that the "judgment would not be *res judicata* as against the United States." And in *Land* v. *Dollar,* 341 U.S. 737, 739, the Supreme Court referred to the quiet title suit brought by the United States here, and reiterated "We have heretofore held that judgments entered in the instant case would not be *res judicata* against the United States. *Land* v. *Dollar,* 330 U.S. 731, 736, 737, 739 (1947)."[7]

The District of Columbia Court of Appeals has likewise consistently recognized that any judgment in *Dollar* v. *Land* would not be binding on the United

[7] Likewise, the Chief Justice in his opinion of April 17, 1951, granting a stay of enforcement of an order of the District of Columbia Court of Appeals pending certiorari (granted June 4), stated:

> "This Court affirmed the Court of Appeals because the suit was directed against Land et al. as individuals, so that neither the United States nor the Maritime Commission were necessary parties and any judgment in the action would not be binding upon the United States under principles of *res judicata.* Land v. Dollar, 330 U. S. 731 (1947)."

A copy of the Chief Justice's opinion on his stay order is filed with this court as Exhibit 4 to the supplementary memorandum filed by the United States on May 31, 1951, in Appeal No. 12917, in opposition to the Dollars' motion to stay Judge Harris' preliminary injunction pending appeal.

States.[8] Thus that Court of Appeals, in modifying a judgment of the District Court which purported to quiet title to the stock in the Dollars (which the defendants contended was an attempt to make the judgment res judicata against the United States) to provide merely that the Dollars were entitled to "effective possession" of the stock "as against defendants" Land, et al., said:

> The result, which is inescapable from the very nature of the controversy, is paradoxical. In an action between a private individual and a public official, the court decides that the United States has no interest in the property involved and so the action will lie, but the ensuing judgment is effective only as to the parties before the court and is not *res judicata* against the United States, not a party. *Land* v. *Dollar,* 188 F. 2d 629, 631 (C.A. D.C.).

Again, the District of Columbia Court of Appeals in its opinion on the issuance of a rule to show cause why certain Government officials should not be held in contempt of court said:

> What then is the meaning of the further holding of the [Supreme] Court that the "judgment would not be *res judicata* as against the United States"? Obviously it meant that, although the judgment would determine the issues between the parties, it would not determine them so far as the United

[8] In its opinion on the merits holding that the Dollars had merely pledged their stock to the Maritime Commission, that court disposed of the defendants' contention that the suit was an unconsented suit against the United States by stating that "the United States is not a necessary party." *Dollar* v. *Land,* 184 F. 2d 245, 257 (C.A. D.C.).

> States, as such, separate and apart from the officer-parties to the suit, is concerned.
> *Land* v. *Dollar,* 190 F. 2d 366, 371 (C.A. D.C.)

In that same opinion the Court of Appeals discarded the Dollars' contention that representation of the defendants by the Department of Justice concluded the United States. It referred to the quiet title action here and to the fact that "The Atorney General of the United States, through his deputies and assistants, was counsel" for the defendants in *Dollar* v. *Land* and stated:

> What the United States seems to assert is the right knowingly to stand aloof throughout a judicial proceeding and, when issues have been finally decided adversely to its views, *to reassert those same issues by its same agents and its same counsel in another proceeding in another court.* Under the rules respecting the forms of legal proceedings, *it has that right* but in the present instance the right involves nothing of undetermined substance. [Italics supplied.]
> *Land* v. *Dollar,* 190 F. 2d 366, 375 (C.A. D.C.)

Finally, the District of Columbia Court of Appeals in its opinion holding Government officials in contempt of court again recognized that the United States has the right to litigate in the California quiet title suit the same issues litigated between the Dollars and Land in the District of Columbia suit, and said:

> It may well be that the rule of *non res judicata* should give way when it serves no practical purpose, when the facts, the persons, and the law in the proposed litigation are identical with those in the litigation finally concluded by decree. *But it is not for this court to attempt to create a varia-*

> *tion to the rule as established by the Supreme Court.* * * * It [the rule of non res judicata] means merely that *if, in the suit of the United States to quiet title, the Dollars should counter with a plea of res judicata, they could not prevail on that ground.* [Italics supplied.]
> *Sawyer* v. *Dollar,* 190 F. 2d 623, 645, 647 (C.A. D.C.)

Thus the District of Columbia Court of Appeals, notwithstanding its strong views that the action of the Goverment officials in seeking interlocutory relief in the quiet title suit here constituted a contempt of that court, did not undertake to overrule the holdings of the Supreme Court that the *Dollar* v. *Land* litigation is not res judicata against the United States. Judge Murphy, however, in dismissing the Government's complaint below, in effect did just that.

Judge Murphy pointedly refrained from citing these rulings in *Dollar* v. *Land.* He was forced to concede that the *Dollar* v. *Land* litigation is not res judicata against the United States on the issue of title to the stock, but he used "collateral estoppel" to reach precisely the same result as if *Dollar* v. *Land* were res judicata (R. 298-305). The result reached is inconsistent with Judge Murphy's own statement that "collateral estoppel * * * is encompassed within the broad doctrine of res judicata" (R. 292).[9] As this Court pointed

[9] "Collateral estoppel" or "estoppel by judgment" is a limited application of the principle of res judicata. See *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82, 84 (C.A. 3); *Restatement, Judgments,* § 68, Comment a (p. 294). It applies only when the parties to the first action (or their privies) are parties to the second action. If the second suit is brought upon the same cause of action as the first, judgment in the first action is res judicata not only as to every issue determined but also as to any issue

out in its opinion of November 20, 1951, collateral estoppel is but another way of saying res judicata (R. 368). *United States* v. *Dollar,* 192 F. 2d—(C.A. 9).[10]

As this Court recognized in its opinion of November 20, it is perfectly obvious that both the Supreme Court and the District of Columbia Court of Appeals have been aware throughout the *Dollar* v. *Land* litigation that the defendants there were being represented by the Department of Justice. Indeed, in later stages of that case the Dollars presented to those courts their contention that that legal representation bound the United States. Thus, the Dollars in their memorandum in support of their motion to dismiss the appeals which were the subject of the opinion of the Court of Appeals in *Land* v. *Dollar,* 188 F. 2d 629, argued "The United States is bound because the Attorney General and those acting under his direction defended the case on its merits" and cited some of the very authorities relied upon by Judge Murphy.[11] Nevertheless, that Court

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which might have been raised in the first suit. But if the second suit is brought upon a different cause of action, judgment in the first suit works an estoppel only as to issues actually litigated and determined. *Cromwell* v. *County of Sac,* 94 U.S. 351; *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591, 597-8; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48-9; *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, 38.

[10] In the court below counsel for the Dollars frequently described their defense as "res judicata". Tr. of March 29, 1951, pp. 243, 250-1; Tr. of April 4, 1951, p. 124.

[11] *Restatement, Judgments* § 84; *Souffront* v. *Compagnie des Sucreries,* 217 U.S. 475.

of Appeals specifically held that the judgment there was not res judicata against the United States (see pages 11-3, above).

Similarly, the Dollars in their brief in opposition, p. 18, footnote, filed in the Supreme Court in *Land* v. *Dollar,* No. 552, October Term 1950, asserted that the fact that "the Department of Justice tried and handled the case" was "a material fact" "If the question of *res judicata* should arise in some proceeding" and again cited some of the authorities relied upon by Judge Murphy.[12]

Again the Dollars in their brief in opposition, page 19, footnote, in *Land* v. *Dollar,* No. 697, October Term, 1950, stated that their contention on res judicata rested on the fact that "the United States through the Department of Justice *thereafter* handled the defense on the merits, wholly controlled the case, and did so to protect its own interest", and again cited more of the authorities relied upon by Judge Murphy.[13] Nevertheless, the Supreme Court granted that petition for certiorari and reiterated its view that *Dollar* v. *Land* is not res judicata against the United States, with a separate memorandum by Mr. Justice Frankfurter pointing out that the Department of Justice had repre-

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[12] The same authorities cited in footnote 11, page 14, above.

[13] The additional authorities cited by the Dollars to the Supreme Court and relied on by Judge Murphy are *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82 (C.C.A. 3); *Drummond* v. *United States,* 324 U.S. 316; *United States* v. *Candelaria,* 271 U.S. 432.

sented the defendants throughout. *Land* v. *Dollar,* 341 U.S. 737.[14]

Judge Murphy completely ignored this Court's holding in *Dollar* v. *United States,* 190 F. 2d 547, 548, that:

> * * * it appears to be recognized and conceded that such determinations [in *Dollar* v. *Land*] were

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[14] See the concurring opinion of Mr. Justice Douglas (who was the author of the Supreme Court's first opinion in *Land* v. *Dollar*) in *Georgia Railroad & Banking Co.* v. *Redwine* (No. 1, Oct. Term, 1951, decided January 28, 1952) in which he said: "There were no special circumstances, as in *Land* v. *Dollar,* 330 U.S. 731, that would keep the suit from being res judicata against the state."

Likewise the Dollars, in their brief in opposition (p. 10) to the petition for certiorari on behalf of Charles Sawyer, Secretary of Commerce, and other Government officials to review the contempt order of the District of Columbia Court of Appeals in *Dollar* v. *Land,* stated: " * * * should a writ be granted, we shall ask the Court to hold that the United States is concluded on principles of collateral estoppel * * * The issue of collateral estoppel has been raised as a defense in the San Francisco suit", and submitted to the Supreme Court a copy of Judge Murphy's opinion so holding.

The Dollars further suggested that the petition for certiorari in No. 247 be denied as moot because of Judge Murphy's order of October 3. See Respondents' Memorandum Calling Attention to Changed Circumstances by Reason of Event of October 3, 1951, and Suggesting that Nos. 32, 34, 247, and 248 are Moot, and that the Orders Granting the Petitions for Writs of Certiorari in Nos. 32 and 34 be Vacated.

The Supreme Court nevertheless granted that petition for certiorari. *Sawyer* v. *Dollar,* No. 247, October Term, 1951.

Finally, the Supreme Court on January 7, 1952, denied the Dollars' petition for certiorari in which they again urged the correctness of Judge Murphy's holding. Pet. for Cert., pp. 11-5, in *Dollar* v. *United States,* No. 494, Oct. Term, 1951.

not binding upon the United States. It would seem to follow that the right of the United States to institute the action below cannot be questioned, nor do we understand that it is argued that the United States may not prosecute that action.

2. Earlier Supreme Court decisions likewise establish that the United States is not bound by Land v. Dollar.

The holdings in *Dollar* v. *Land* that the United States is not bound by proceedings there, although it was apparent that the Department of Justice represented the individual defendants, are in accordance with earlier decisions in which the Supreme Court has specifically held that the use of Government attorneys and Government funds to defend the individual who holds possession of property on behalf of the United States does not make the United States concluded or estopped by the judgment in such action.

In *Carr* v. *United States,* 98 U.S. 433, the Government brought a suit to quiet title to land in San Francisco against an adverse claimant, who relied upon three judgments in his favor against the Government officials in possession. In two of those proceedings "The question of title was gone into"; in the third the "judgment would not have been decisive upon the title." 98 U.S. at 436-7. The individual defendants were represented by the United States District Attorney and by counsel employed by the Secretary of the Treasury. Carr contended that this legal representation was "sufficient to make the United States a virtual party to said actions, and to conclude them by the

judgment therein." 98 U.S. at 437. The Supreme Court, however, rejected Carr's contention, held that the United States was not estopped, and affirmed a decree quieting the title of the United States. The Court stated that the Secretary of the Treasury "may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And in fact, he had no authority to waive those rights." 98 U.S. at 438.

The *Carr* case is a precise analogy here. The District of Columbia courts in an action by the claimants (the Dollars) against Government officers holding custody on behalf of the United States (Land, et al.) has found that the claimants are entitled to possession as against the Government officers and in connection therewith has said that the United States does not have title to the stock. The United States then brings its quiet title action here; and the Dollars, just as Carr did, contend that the Government is estopped by the judgment in *Dollar* v. *Land* because the Government assumed the defense of the suit against the officers as individuals. Judge Murphy has accepted this contention held unfounded by the Supreme Court.

Judge Murphy "with all due deference" suggests that the Carr case "is at odds with modern doctrines as to both estoppel and immunity" (R. 302). The Supreme Court appears to think otherwise. It explicitly reaffirmed this holding of the *Carr* case in *United States* v. *Lee,* 106 U.S. 196, 216-7, 222 (see p. 21 infra), and has never since intimated any disapproval of that holding. On the contrary the Supreme Court

continues to cite *Carr* with approval in its more recent decisions on this point.[15] See *United States* v. *Shaw,* 309 U.S. 495, 501, stating," * * * without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction"; *Minnesota* v. *United States,* 305 U.S. 382, 388-9, stating, "Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States"; *Hussey* v. *United States,* 222 U.S. 88, 93, holding that representation of Government officials by the Department of Justice does not estop the United States; *Stanley* v. *Schwalby,* 162 U.S. 255, 270, holding that the Attorney General cannot submit the United States to the court's jurisdiction in a suit brought against its officers. See also *Illinois Central R. Co.* v. *State Public Utilities Comm.,* 245 U.S. 493, 504-5.

Judge Murphy also sought to reconcile his holding with the *Carr* case by the proposition (to us, self-inconsistent) that although the title of the United States could not be concluded in the suit against the officer, the United States nevertheless will not be permitted to litigate its title in the quiet title action unless it demonstrates "that a substantial factual issue was present other than that decided in *Dollar* v. *Land*" (R.

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[15] The only statement in the *Carr* case disapproved in the *Lee* case was the dictum that when it appears in a suit against an officer that he is holding possession on behalf of the Government, "the jurisdiction of the court ought to cease." See 98 U.S. at 438; 106 U.S. at 216, 217.

303-4).[16] Of course there is not a word in the *Carr* decision to suggest any such requirement.

On the contrary, in *Tindal* v. *Wesley,* 167 U.S. 204, 223, in which the Supreme Court reaffirmed its holdings that the sovereign is not concluded by the judgment in a suit against the official holding possession, the Court said:

> It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; *and the record in this case will not be evidence against it for any purpose touching the merits of its claim.* [Italics supplied.]

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[16] This seems to confuse the res judicata issue with the question of the propriety of summary judgment procedure here, which we discuss at pp. 34-53, infra. For purposes of the res judicata discussion it is sufficient to point out that the provisions of the Federal Rules of Civil Procedure for summary judgment cannot affect the immunity of the United States from suit. *United States* v. *Sherwood,* 312 U.S. 584, 589-90.

Furthermore, Judge Murphy's statements that the United States has no new evidence to present in the quiet title trial [17] are contradicted by the record (R. 70; see R. 309-12 and pages 49-52, infra), as Judge Harris recognized in his opinion on the preliminary injunction (R. 146).

United States v. *Lee,* 106 U.S. 196, was a suit in ejectment by claimants to land to recover its possession. The defendants were army officers holding under title asserted by the United States. They were represented by the Attorney General. Nevertheless, the Supreme Court held, in reliance upon the *Carr* case, that judgment in that action would not be conclusive against the United States. The court said that such "action was equally inconclusive against the United States, whether the persons sued were officers of the government or not" (p. 217), and continued:

> That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that [the *Carr*] case, and was all that was decided. * * *
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> * * * since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can

[17] Judge Murphy said, wholly without warrant: "And there is no pretense made that the Government is now seeking to relitigate the very same issues *upon the identical record* out of other than sheer disgruntlement over the failure of its prior efforts." (R. 301) [Italics supplied].

> bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. * * * (106 U.S. at 217, 222).

Other decisions of the Supreme Court reiterate the rule of the *Carr* and *Lee* cases that the sovereign is not concluded by the judgment in a suit against officials who hold property under a claim of title by the Government, although in all such cases the defendant was represented by the Government's law officers. *Scranton* v. *Wheeler,* 179 U.S. 141, 152-3, holding that such judgment "will not prevent it [the United States] from instituting a suit for the direct determination of its rights," *Cunningham* v. *Macon & Brunswick R.R. Co.,* 109 U.S. 446, 452, holding that such judgment would "not conclude the United States"; *McClellan* v. *Carland,* 217 U.S. 268, 282, stating that the sovereign's "rights would not have been concluded by any adjudication made therein"; *Tindal* v. *Wesley, supra;* and *Stanley* v. *Schwalby, supra,* holding that "the United States would not be bound or concluded by the judgment against their officers." [18]

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[18] There are a number of decisions by the courts of appeals and the district courts to the same effect. *Scranton* v. *Wheeler,* 57 F.

See also the cases holding that a judgment against a Collector of Internal Revenue, sued in his private capacity, is not res judicata against the Commissioner of Internal Revenue or the United States. *Sage* v. *United States,* 250 U.S. 33; *Bankers Coal Co.* v. *Burnet,* 287 U.S. 308, 311-2; *Tait* v. *Western Maryland Ry. Co.,* 289 U.S. 620, 627; *United States* v. *Kales,* 314 U.S. 186, 199-200; *United States* v. *Nunnally Investment Co.,* 316 U.S. 258.

Similarly, in many other cases the fact that the Government officials sued were represented by the Department of Justice did not deter the Supreme Court from holding that the courts had no jurisdiction to adjudicate the Government's property rights, which would not be so if the United States could be concluded by the judgment in the suit against the officer. *Minnesota* v. *United States,* 305 U.S. 382; *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682; *Belknap* v. *Schild,* 161 U.S. 10.

3. The Attorney General has no authority to waive sovereign immunity in Dollar v. Land; hence his representation of the defendants there could not bind the United States to the judgment even if he had sought to do so, which he did not.

Neither the Attorney General nor any of his sub-

803, 807 (C.C.A. 6), reversed on another ground, 163 U.S. 703; *Crane* v. *United States,* 44 C. Cls. 324, 354-5, affirmed 222 U.S. 88, 93; *Stone* v. *Interstate Natural Gas Co.,* 103 F. 2d 544, 547 (C.C.A. 5), affirmed *per curiam* 308 U.S. 522; *United States* v. *Van Horn* 197 F. 611, 617 (D. Colo.); *United States* v. *McIntosh,* 2 F. Supp. 244, 255 (E.D. Va.); *Blondet* v. *Hadley* 144 F. 2d 370, 371-2 (C.A. 1); *Correa* v. *Barbour,* 71 F. 2d 9, 12 (C.C.A. 1); *Wood* v. *Phillips,* 50 F. 2d 714, 717 (C.C.A. 4); *Appalachian Electric Power Co.* v. *Smith,* 67 F. 2d 451, 456-8 (C.C.A. 4).

ordinates in the Department of Justice has any power or capacity to waive the sovereign's immunity from suit. *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-4; *United States* v. *Shaw,* 309 U.S. 495, 500-1; *Minnesota* v. *United States,* 305 U.S. 382, 388-9; *Munro* v. *United States,* 303 U.S. 36, 41. As stated in *Stanley* v. *Schwalby,* 162 U.S. 255, 270:

> Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers.

Accordingly, the fact that the Department of Justice attorneys who tried *Dollar* v. *Land* occasionally referred from force of habit to "the Government" rather than to "the defendants" (R. 265-75)—and even in such references it was plain that the court and counsel all understood that the action was against Land et al. as individuals and the United States was not a party—is entirely without legal significance.[19] Those attor-

[19] The statement of the Department of Justice attorney, quoted by Judge Murphy, to the effect that the United States was the client (R. 268,295) was strictly correct, for the statement was made in connection with a request by Dollar counsel for the production of a letter to the Maritime Commission from its special counsel, as to which the Department of Justice attorney asserted the attorney-client privilege (R. 267). In arguing against the privilege Mr. Lasky, Dollar counsel, stated: "If there was an attorney client relationship here, the client was the United States Maritime Commission. The United States Maritime Commission is not a party to this suit. The party against whom testimony is

neys could not have submitted the United States' title to the stock to adjudication in *Dollar* v. *Land* even if they had attempted to do so (and their references to "the Government" certainly were not such attempts).

The representation by the Department of Justice of the officials who were sued as individuals in *Dollar* v. *Land* (as well as in all the other cases cited above) was undertaken pursuant to the broad provisions of 5 U.S.C. 309, 316, authorizing the Attorney General "whenever he deems it for the interest of the United States * * * [to] conduct and argue any case in any court of the United States in which the United States is interested." See Department of Justice Circular No. 4122, stating: "It has long been the general policy of the Department to afford counsel and representation to Government employees and servicemen who are sued civilly or charged with violation of local or state criminal laws

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offered cannot assert the privilege, if he was not the privileged client." (Tr. *Dollar* v. *Land,* p. 705).

In connection with the statement of the Department of Justice attorney, quoted by Judge Murphy, that "in taking the view that the Government is the real party in interest" (R. 267), Mr. Harrison, Dollar counsel, stated: "I am confused by the statement of counsel that the Government was in this case. This was an action brought against individuals. Individuals are defendants here. The Government has not pleaded its title. The Government has not intervened, and therefore the Government is not, as I understand it, a party to this suit" (R. 266). In response to the Court's question: "Is the Government in this picture," the Department of Justice attorney replied: "I assume that our position will be as stated in the Supreme Court [i.e., *Land* v. *Dollar,* 330 U.S. 731], and dependent upon the answer" (R. 266). He also said "That is correct", in reply to the Court's statement that "The individual members of the Maritime Commission" "are individually responsible" "in the nature of tort" (R. 266-7).

as a result of the performance of their official duties."

The United States was interested in *Dollar* v. *Land* not because its property rights in the stock could be there adjudicated, but because, having regard to the efficient administration of government, it is to the interest of the United States that Government officials who are sued with respect to allegedly improper or illegal acts performed by them under color of office not be compelled to retain private counsel at their own expense to defend such suits. If Government officials were required to defend suits of this type out of their own pockets, few responsible persons would assume such risks of Government service, and those who did would be deterred from performing their duties with the requisite zeal and selfless devotion to the public interest. *Booth* v. *Fletcher,* 101 F.2d 676, 681-3 (C.A. D.C.); see also *Spalding* v. *Vilas,* 161 U.S. 483, 498; *Gregoire* v. *Biddle,* 177 F.2d 579, 581 (C.A. 2).

4. The authorities relied on by the court below are inapposite.

The only cases cited by Judge Murphy which have any relevance to the issue as to whether the United States can be concluded by the judgment in a suit against its officers because they are represented by the Department of Justice are *United States* v. *Candelaria,* 271 U.S. 432; and *Drummond* v. *United States,* 324 U.S. 316 (R. 304-5). Both are distinguishable.

In the *Candelaria* case the Indian tribe whose interests the United States represented through Government counsel was *plaintiff* in the action pleaded as res judicata. Of course, no question of Government immunity is involved where the United States is plaintiff

in the original action. This distinction was made in *Carr* v. *United States,* 98 U.S. 433, 438-9, where cases such as *The Siren,* 7 Wall. 152, 154, 159, were distinguished because the United States had instituted the action.

Furthermore, in the *Candelaria* case, title to the property was claimed by the Indian tribe, subject only to a restraint against alienation imposed by the Government. Hence, the title claimant was a formal party to the action pleaded as res judicata, and the United States was concluded from relitigating merely the tribe's title, not a claim of title of its own. Of course, in *Dollar* v. *Land* the defendants Land, et al., did not claim any title to the stock in themselves, and the United States in the quiet title action is litigating its own title, not any title claimed by Land.

In the *Drummond* case the United States was held not to be concluded by a prior action to which an Indian tribe was a party, although the Secretary of the Interior had authorized the tribe's employment of counsel and approved his fee. The statement there as to other circumstances under which the United States might be bound (citing only *Candelaria,* supra, where no question of sovereign immunity or a title claimed by the United States was involved) is not controlling in this type of case.

It is significant that the Supreme Court, in holding that *Dollar* v. *Land* would not be res judicata against the United States, cited the *Lee* case (which explicitly held that no officer of the Government could by defending a suit against its officers conclude the United

States by the judgment) rather than the *Candelaria* and *Drummond* cases. *Land* v. *Dollar,* 330 U.S. 731. See also *Goddard* v. *Frazier,* 156 F. 2d 938, 940 (C.C.A. 10), holding that the United States is not bound by prior litigation in which the Indian was represented by a Government attorney because he "represents the Indian, not the United States."

Cases such as *Souffront* v. *Compagnie des Sucreries,* 217 U.S. 475, and *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82, 84 (C.A. 3), dealing with the binding effect of prior litigation between *private* parties are inapposite here since they involve no question of sovereign immunity. General principles as to the binding effect of a judgment must yield to the principle of sovereign immunity. *United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 514-5.[20]

Although Judge Murphy cited the *Restatement of Judgments,* § 84 (R. 293-4), he apparently overlooked the many provisions in that *Restatement* that the general principles there laid down as to the binding effect of judgments have no application where the prior judgment is sought to bind the sovereign. "The extent of the immunity of a sovereign is not within the scope of the Restatement of this Subject." *Restatement of Judgments,* § 5, Comment k (p. 35); § 32, Comment j (p. 132).[21]

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[20] Of course, there is no such conflict of principles where Congress has consented to suit against the Government, as in *Jackson* v. *Irving Trust Co.,* 311 U.S. 494, 500.

[21] § 5 k. "*Jurisdiction over a sovereign and its property.* The courts normally cannot exercise jurisdiction over a sovereign, do-

Other sections of the *Restatement of Judgments* explicitly provide that its rules are not applicable where, as here, the sovereign's officials are not empowered to waive immunity. §§ 9b (p. 53), 78d (p. 352), 85g (pp. 407-8). Thus, the *Restatement* explicitly recognizes and affirms the rule of the *Carr* and *Lee* cases that since the Attorney General has no authority to submit the United States to the courts' jurisdiction (except as Congress has consented), a judgment against its officers in a case like *Dollar* v. *Land* cannot estop the United States from litigating the issue of title in the quiet title suit here. [22]

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mestic or foreign, or over its property, without its consent. A judgment, whether in a proceeding in personam or in rem or quasi in rem, against a sovereign or its property rendered without its consent is void. So also, the persons and property of representatives of a foreign sovereign, such as ambassadors, are not subject to the jurisdiction of the court. The extent of such immunities is not within the scope of the Restatement of this subject."

§ 32 j. "*Property of a sovereign.* As a sovereign is not subject to the jurisdiction of the court unless it has consented to the exercise of jurisdiction over it, so the property of a sovereign is not subject to the jurisdiction of the court without its consent. Neither a proceeding in personam, nor a proceeding in rem or quasi in rem can be maintained against a State without its consent. Thus, if property is seized by an officer of the United States as property of an enemy alien, the owner of the property cannot maintain an action in personam or an action in rem or quasi in rem against the United States for the recovery of the property, unless by Act of Congress such a suit is permitted. So also, property of the United States or of a State or of a foreign sovereign cannot be reached by attachment without its consent. The extent of the immunity of a sovereign is not within the scope of the Restatement of this Subject."

[22] Finally, the *Restatement of Judgments,* § 83 (p. 389) states: "A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is *to the extent*

The limitation imposed by sovereign immunity upon the general principles of res judicata and collateral estoppel is likewise recognized in 1 Freeman, *Judgments* (5th ed. 1925), § 509 (p. 1098):

> The United States is not bound either by a judgment against a state officer who has no power to submit to the courts its title or rights, or by the judgment in an action against its own agent or officer unless it consented to being sued. This is true with respect to a judgment for possession of property held by the officer or agent as government property, and the action of its local district attorney in appearing for and defending the officer or agent sued, at the direction of the attorney general and secretary of the treasury, does not amount to such consent.

"Suits Against Government Officers and the Sovereign Immunity Doctrine", 59 Harv. L. Rev. 1060, cited by Judge Murphy (R. 297), does not discuss at all the problem present here as to whether the United States can be estopped by the judgment in an action against its officers because the Attorney General represented such officers. That article deals with the circumstances in which an action against a Government officer may

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stated in §§ *84-92* bound by and entitled to the benefits of the rules of res judicata." [Italics supplied.]

Hence, the general provisions of the *Restatement*, §§ 83, 84, quoted by Judge Murphy are expressly qualified with respect to their application to the sovereign by § 85 (p. 408) which states:

"The rule stated in this Section applies only where there is authority or other power to bring or defend an action with reference to the particular subject matter in the controversy. * * * A public officer may or may not have power to bind the State or municipality in proceedings brought by or against him."

be maintained without meeting the objection that it is an unconsented suit against the United States. [23]

Finally *Cruise* v. *City and County of San Francisco,* 101 A.C.A. 613, cited by Judge Murphy (R. 299) may or may not correctly state the California law as to estoppel of municipal corporations. It certainly does not state the law as to the United States, for, as shown by the cases cited above, it is firmly established that the United States may not be estopped by the acts of its law officers in representing officials sued in their individual capacities.[24]

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[23] The author's conclusion is that such an action should be maintainable only when it is claimed that the defendant officer is acting pursuant to an unconstitutional statute or in excess of his statutory authority, but should not be maintainable when his act is merely an injury to the plaintiff. This conclusion foreshadows the result reached in *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U.S. 682, which explains that *Land* v. *Dollar* is maintainable not on the premise that the Dollars had merely pledged the stock and were entitled to get it back upon payment of the debt, but on the basis of the allegations in the complaint that Land, et al. "acted in excess of their authority as public officers." 337 U.S. at 702, footnote 26.

[24] For additional authorities holding generally that the United States cannot be estopped by acts of its officers, see *Federal Crop Insurance Corp. v. Merrill,* 322 U.S. 380; *Wilber National Bank* v. *United States,* 294 U. S. 120, 123; *Royal Indemnity Co.,* v. *United States,* 313 U.S. 289; *United States* v. *Stewart,* 311 U.S. 60, 70; *Utah et al.* v. *United States,* 284 U.S. 534, 545, 546; *Cramer et al.*v. *United States,* 261 U.S. 219, 234; *Jeems Bayou Fishing & Hunting Club et al.* v. *United States,* 260 U.S. 561, 564; *Utah Power & Light Company* v. *United States,* 243 U.S. 389, 408, 409; *Pine River Logging Company* v. *United States,* 186 U.S. 279, 291; *Filor* v. *United States,* 9 Wall. 45, 49; *Coleman* v. *United States,* 100 F. 2d 903 (C.A. 6); *Walter C. Reediger, Inc.* v. *United States,* 94 C. Cls. 120, 125.

5. The authorities relied on by appellees are likewise inapposite.

In the court below the Dollars relied on the following authorities and presumably will do so here. All of them are distinguishable.

Hill v. *Wallace,* 259 U.S. 44, did not involve any question as to whether the court's judgment would be binding upon the United States. The Solicitor General's appearance there on behalf of the United States was treated as an appearance *amicus curiae.* In *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, Congress had authorized the Bituminous Coal Commission to bind the United States.[25] In *Minnesota* v. *Hitchcock,* 185 U.S. 373, 388, and in *Gunter* v. *Atlantic Coast Line Railroad Co.,* 200 U.S. 273, 287-8, there was express legislation authorizing the maintenance of the suit against the sovereign. The position of the city in *New Orleans* v. *Gaines's Administrator,* 138 U.S. 595, 607, was no different from that of a private party (see *Lincoln County* v. *Luning,* 133 U.S. 529, 530; *Hopkins* v. *Clemson College,* 221 U.S. 636, 645) and consequently the *New Orleans* case involved no question of sovereign immunity.

The cases dealing with the institution of suits by the sovereign (*United States* v. *California,* 332 U.S. 19, 26-8) or its intervention in pending litigation (*Clark* v. *Barnard,* 108 U.S. 436, 447-8; *United States* v. *Bank of New York,* 296 U.S. 463, 480; *In re Read-York,* 152 F.2d 313 (C.A. 7)) are inapplicable since the United

[25] It is noteworthy that the *Sunshine* case reiterates the rule that a suit against a Government official in his individual capacity is not binding upon the United States. 310 U.S. at 403.

States never sought formally or informally to be made a party to the District of Columbia litigation.[26]

Accordingly, Judge Murphy's holding that the United States is concluded by *Dollar* v. *Land* because the Department of Justice represented the defendants in that action is squarely in conflict with the controlling decisions of the Supreme Court and this Court. Indeed, it even conflicts with the decisions of the District of Columbia Court of Appeals upon which the Dollars rely.[27]

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[26] In *Land* v. *Dollar,* 188 F. 2d 629, 632 where the United States appeared specially without submitting itself to the jurisdiction of the district court, the District of Columbia Court of Appeals held that "the United States did not submit itself to the jurisdiction of the trial court."

[27] The fact that the United States is not bound by *Dollar* v. *Land* does not mean that the litigation was fruitless to the Dollars. They have obtained an adjudication of their right to possession of the stock as against the defendants in that action (subject, of course, to review by the Supreme Court on the pending petition for reconsideration of the denial of a writ of certiorari to review the merits), and that was all the Dollars had any right to expect under that form of litigation. Furthermore, the Dollars have obtained possession of the stock certificates and have prevented the United States from selling the stock. They have no reason to complain that they have not obtained control of the company through being able to vote the stock, since that is a prerogative of ownership, not mere possession of stock. *Pacific National Bank* v. *Eaton,* 141 U.S. 227, 233-4; *National Bank* v. *Watsontown Bank,* 105 U.S. 217, 222.

More important, the result in *Dollar* v. *Land* has impelled the United States to submit its title to a judicial determination in the quiet title suit here, so that the conflicting claims between he Dollars and the United States will be finally resolved. Other persons with claims to property in the possession of the United States have been barred by sovereign immunity from obtaining any similar adjudications and relief. See *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682.

II

The District Court erred in disposing of the action by summary judgment.

Judge Murphy disregarded this Court's admonition against acting summarily in this litigation (*Dollar* v. *United States,* 190 F. 2d 547) in concluding that the case, in its posture before him, was appropriate for disposition by summary judgment. His reasoning seems confused, but apparently he went on the ground that there is no factual issue to try if (as he concluded was the case) the United States is estopped by the *Dollar* v. *Land* judgment. Thus Judge Murphy said: "But where the only conflict is as to what legal conclusions should be drawn from the undisputed facts, *or whether some rule of law precludes litigation* [i.e., "collateral estoppel"], a summary judgment generally lies" (R. 287) [Italics supplied].

The short answer is that, as we have shown above, Judge Murphy erred in his legal conclusion that the United States is estopped by *Dollar* v. *Land.* On the contrary, the United States is entitled to its own trial of the issue of title to the stock on such record as the parties may see fit to make in the quiet title suit.

Judge Murphy also used language to the effect that (collateral estoppel aside) the decision by the District of Columbia Court of Appeals of the title issue in favor of the Dollars in *Dollar* v. *Land* eliminated any dispute of fact on that issue and was sufficient ground for depriving the United States of a chance to prove in a trial here that it owns the stock (R. 287-90). In

other words, he thought that *stare decisis* has eliminated any substantial issue of fact here. That conclusion is likewise erroneous.

This problem should be approached from the standpoint expressed in the recent decisions by the Supreme Court that the use of summary judgment to shut off a full trial is to be sharply restricted. Thus in *Sartor* v. *Arkansas National Gas Corp.,* 321 U.S. 620, which involved a course of litigation about as protracted and tortuous as that here, the Supreme Court reversed a summary judgment for the defendant, based, like Judge Murphy's order, on affidavits of interested persons and a stipulation, on the ground that the plaintiff should not be deprived of the right to cross-examine the defendant's witnesses.

In *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 256, the Supreme Court held that where the case involved, as here, important issues as to the meaning of a complicated contract with a Government agency, dependent upon its practical construction by the parties and "reduction of the mass of conflicting contentions as to fact and inference from facts," summary judgment was inappropriate.

Likewise, in *Arenas* v. *United States,* 322 U.S. 419, 434, the Supreme Court reversed a summary judgment for the United States as defendant which, like the present case, was based on affidavits and the record made in another lawsuit, stating that the plaintiff was entitled to "a chance to establish his legal claim if he can by trial."

Again, in *Eccles* v. *Peoples Bank of Lakewood Vil-*

lage, 333 U.S. 426, 434, the Supreme Court reversed a summary judgment, stating: "Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment."

Furthermore, a party moving for summary judgment has the burden of establishing the non-existence of any genuine issue of fact and all doubts are resolved against him. *Walling* v. *Fairmont Creamery Co.,* 139 F. 2d 318, 322 (C.A. 8); *Wittlin* v. *Giacalone,* 154 F. 2d 20 (C.A. D.C.); *Dewey* v. *Clark,* 180 F. 2d 766, 772 (C.A. D.C.); *Traylor* v. *Black, Sivalls & Bryson, Inc.,* 189 F. 2d 213, 216 (C.A. 8). The United States "has a right to a trial where there is the slightest doubt as to the facts." *Doehler Metal Furniture Co.* v. *United States,* 149 F. 2d 130, 135 (C.A. 2).

On this appeal this Court will give appellant the benefit of every doubt that the case was properly disposed of by summary judgment. *Walling* v. *Fairmont Creamery Co., supra; Weisser* v. *Mursam Shoe Corporation,* 127 F. 2d 344, 346 (C.A. 2).

1. The Dollar v. Land trial record and decision of the District of Columbia Court of Appeals thereon show the existence of a substantial issue of fact.

The incomplete trial record printed for the District of Columbia Court of Appeals on the Dollars' appeal from the trial of *Dollar* v. *Land* on the merits, consisting of 2,142 pages,[28] was before Judge Murphy (R.

[28] This is not the complete trial record, but merely such portions

242-3, 250-1). He does not purport, however, to have made an independent examination of that record and to have formulated a conclusion of his own as to whether it presented substantial issues of fact, either as to the ultimate issue of whether the parties intended to transfer the stock in pledge or outright,[29] or as to the multitudinous "evidentiary facts" bearing on the ultimate issue of the parties' intent. Indeed Judge Murphy did not even mention in his opinion any of the evidence or facts relevant to those issues. His failure to do so emphasizes that he was really resting his decision on collateral estoppel.

If Judge Murphy had reached an independent conclusion, based on his analysis of the *Dollar* v. *Land* record, that the Dollars had merely pledged the stock, it would then be incumbent on this Court either to reverse on the ground that disputed issues of fact may not be resolved on motion for summary judgment (*Chappell* v. *Goltsman,* 186 F. 2d 215, 218 (C.A. 5)), or to review the correctness of such a decision. We are

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thereof as counsel thought necessary to bring before the Court of Appeals on the issues deemed to be before that Court on that appeal.

[29] As this Court recently held, where, as here, the construction of a written instrument depends upon facts and circumstances illuminating the parties' intentions, the issue is one of fact. *Quon* v. *Niagara Fire Ins. Co.,* 190 F. 2d 257, 260-1 (C.A. 9). In *Copp* v. *Van Hise,* 119 F. 2d 691, 695 (C.A. 9), this Court said that the construction of a contract is a question of law "if the terms of the contract and the extrinsic facts which may affect its construction are free from dispute." As we show below, this is not such a case. See also *Gray Tool Co.* v. *Humble Oil & Refining Co.,* 186 F. 2d 365, 367 (C.A. 5), and *Morissette* v. *United States* —— U.S. —— (No. 12, Oct. Term, 1951, decided January 7, 1952), p. 28 of slip opinion.

confident of our ability to convince this Court at the proper time that the stock was transferred outright, not in pledge, but we do not believe this Court will undertake such an inquiry in the present posture of the case, without the benefit of any findings or conclusions on that issue by the court below. *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 256; *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.,* 181 F. 2d 341 (C.A. 5). "To do so here would be to convert an appellate court into a trial court * * * When the trial occurs before a judge without a jury, we have his findings of fact separated from his legal conclusions." *Arnstein* v. *Porter,* 154 F. 2d 464, 474 (C.A. 2); *Colby* v. *Klune,* 178 F. 2d 872, 874 (C.A. 2).

Judge Murphy was apparently misled by the wholly erroneous contention of the Dollars that the District of Columbia "Court of Appeals was compelled to reverse on the grounds that it [the record] contained no substantial evidence of absolute transfer" (R. 290).

Actually the very opinion of the District of Columbia Court of Appeals shows in itself that the record before it *did* present a substantial issue of fact as to whether the stock was transferred in pledge or outright. That Court first held it could disregard Rule 52(a), F.R.C.P., ignore the trial judge's findings that the transfer was one of outright title, and substitute its own. *Dollar* v. *Land,* 184 F. 2d 245, 248-9 (C.A. D.C.). It then discussed eight facts indicating that the stock was transferred outright and nine facts it thought indicated a pledge (184 F. 2d at 251-3). The Court of Appeals concluded:

> There is no single decisive index to the nature of the 1938 contract. The answer to the problem depends upon the comparative evaluation of various indices, some pointing one way and some the other.
>
> * * * * *
>
> We are of opinion, upon balancing the conflicting considerations, that the transfer of the shares under the 1938 contract was a pledge. * * *
> (184 F. 2d at 250, 253).

Obviously no court could rationally conclude that a record showing (1) that R. Stanley Dollar took a capital loss on the stock in his 1938 income tax return, stating he had transferred "all his right, title and interest" in the stock; (2) that although the San Francisco newspapers prominently carried a press release by the Maritime Commission that it was acquiring "absolute title" to the stock, the Dollars made no objection and thereafter transferred the stock although they were free to back out of the deal; (3) that Dollar of California after 1938 dropped the stock as an asset in its balance sheet; (4) that R. Stanley Dollar referred to himself as a "former owner"; and (5) that the Estate of J. Harold Dollar petitioned the California probate court for an order authorizing "sale" of the stock, did not raise a substantial issue of fact as to whether the stock was transferred outright. Since that record "certainly apprised the trial judge that there was relevant and important evidence which * * * appellant could and would tender on the trial," the granting of summary judgment was error. *Whitaker* v. *Coleman,* 115 F. 2d 305, 307 (C.A. 5).[30]

[30] Since the District of Columbia record discloses a substantial

Whether or not Judge Murphy was correct in his conclusion (R. 288-9) that the stipulation entered into in *Dollar* v. *Land* was before him on the motion for summary judgment [31] is immaterial. For that stipulation, like the printed trial record, merely presented a mass of evidentiary data which could form the basis for conflicting inferences as to the ultimate fact issue of pledge or outright transfer. Indeed the stipulation shows that there *is* a substantial issue of fact present, not the contrary.

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issue of fact, cases relied on by the Dollars sustaining summary judgment where there was no issue of fact, such as *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (C.A. 2); *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905 (E.D. Pa.), affirmed per curiam, 155 F. 2d 522; *McComb* v. *Southern Weighing & Inspection Bureau*, 170 F. 2d 526 (C.A. 4); *Chandler Laboratories* v. *Smith*, 88 F. Supp. 583 (E.D. Pa.); or where the moving party is entitled to judgment as a matter of law, such as *Suckow Borax Mines Consolidated* v. *Borax Consolidated*, 185 F. 2d 196 (C.A. 9); *Gifford* v. *Travelers Protective Ass'n.*, 153 F. 2d 209 (C.A. 9); *Egyes* v. *Magyar Nemzeti Bank*, 165 F. 2d 539 (C.A. 2), are beside the point.

[31] The stipulation, 137 pages in length and incorporating hundreds of documents by reference, is Exhibit 1 to the Dollars' request for admissions of fact (see R. 242). *But none of the documents to which it refers were filed in the court below.* We trust that Judge Murphy did not attempt to draw conclusions as to the probative effect of documents he has never seen. Furthermore, the stipulation reserved objections of relevance and materiality to the data stated therein, was not evidence in the *Dollar* v. *Land* trial (except such particular parts thereof as were offered and received in evidence at the trial), and in certain respects permitted the parties to offer evidence contradicting it (Stip., pp. 1, 2).

Although the issue is not now material (see R. 309), we submit that appellant was justified in its refusal to admit that everything in the stipulation was true (R. 245-50) and hence that the stipulation was not properly before Judge Murphy. *Dulansky* v. *Iowa-Illinois Gas & Electric Co.*, 92 F. Supp. 118 (S.D. Ia.).

How could a record which the District of Columbia Court of Appeals found presented a substantial issue of fact when it was before that court become a record not presenting a substantial issue of fact when before Judge Murphy? Obviously, only on the premise that the issue of fact was eliminated by the decision of the District of Columbia Court of Appeals. That premise is bad law; it elevates *stare decisis* to the conclusive effect of *res judicata,* by assuming that once a fact has been decided on conflicting evidence in a lawsuit between A and B, C in another lawsuit with A is to be denied even an opportunity to prove the truth to be otherwise.

This court has held that *stare decisis* does not have any such conclusive effect. *The Diamond Cement,* 95 F.2d 738, 742 (C.A. 9); *Quon* v. *Niagara Fire Ins. Co.,* 190 F.2d 257, 260 (C.A. 9); *Pacific American Fisheries, Inc.* v. *Mullaney,* 191 F.2d 137 (C.A. 9). *Stare decisis* is not to be used to prevent litigants (not bound by *res judicata*) from demonstrating that an earlier decision by another court is erroneous. *Helvering* v. *Hallock,* 309 U.S. 106, 119. See also *Commissioner of Internal Revenue* v. *City Nat. Bank & Trust Co.,* 142 F.2d 771, 772 (C.A. 10); *Reo Motors* v. *Commissioner of Internal Revenue,* 170 F.2d 1001, 1004 (C.A. 6), affirmed 338 U.S. 442).[32] As stated in *Haberle Crystal Springs*

[32] This is not a case such as *Vail* v. *Arizona,* 207 U. S. 201, where *stare decisis* was applied with special force because intervening rights of innocent third persons had arisen in reliance on the first decision.

And of course the United States never agreed to abide by the decision of the District of Columbia Court of Appeals in *Dollar* v. *Land,* as was the case in *Prout* v. *Starr,* 188 U.S. 537, 542.

Brewing Co. v. *Clarke,* 30 F.2d 219, 222 (C.A. 2):

> Much as we respect the considered decisions of other circuits, we conceive that our duty requires us to form an independent judgment in cases of first impression in our own court, and forbids us blindly to follow other circuits, when our minds are not persuaded by the arguments advanced.

Since the United States is not concluded by the *Dollar* v. *Land* litigation, it cannot be deprived by summary judgment of its right to try out here the issue as to whether or not the stock was transferred outright and to obtain the independent judgment of the courts of this circuit on that issue, merely because the District of Columbia Court of Appeals has reached an adverse conclusion in litigation between other parties. *Triplett* v. *Lowell,* 297 U.S. 638, 642, 644-5.

Indeed, on the motion for summary judgment the decision and record in *Dollar* v. *Land* was "entirely irrelevant." *Arnstein* v. *Porter,* 154 F.2d 464 (C.A. 2) was a suit for copyright infringement in which the defendant submitted depositions of plaintiff and himself and the records of five other infringement suits which plaintiff had lost. In reversing a summary judgment for defendant, the Court of Appeals said (pp. 474-5):

> * * * Defendant asked the judge to take judicial notice of the record of another infringement suit in the same court, *Arnstein* v. *American Soc. of Composers,* D.C., 29 F.Supp. 388, involving the same issue as to the same composition, brought by plaintiff against another person, not in privity with the

defendant here, in which decision on that issue had been adverse to plaintiff. On that ground, the judge held that the present action, so far as based on "A Mother's Prayer," must be dismissed. In so holding, the judge erred. * * * The adjudication in the previous suit is entirely irrelevant.

* * * defendant asked the judge to take judicial notice of five previous copyright infringement actions, including the one just mentioned above, brought by the plaintiff in the same court against other persons, in which plaintiff had advanced some legal arguments like those he advances here, and in which he had been defeated. The judge in his opinion referred to but one of those suits, *Arnstein* v. *American Soc. of Composers,* and purported not to pass on the motion to dismiss for vexatiousness. But in his order for final judgment he specifically referred to the "record" of the court in the five cases, naming them, as constituting in part the basis of the judgment.

* * * * *

* * * we regard it as entirely improper to give any weight to other actions lost by plaintiff. Although, as stated above, the judge in his opinion, except as to one of the previous actions, did not say that he rested his decision on those other suits, the language of his final judgment order indicates that he was probably affected by them. If so, he erred. Absent the factors which make up res judicata (not present here), each case must stand on its own bottom, subject, of course, to the doctrine of stare decisis. Succumbing to the temptation to consider other defeats suffered by a party may lead a court astray; * * *.

Likewise, the District of Columbia Court of Appeals has no hesitation about refusing to follow a decision by a sister Court of Appeals in another suit between the *same* parties involving the same facts and legal issue, when it deems that decision erroneous. *Coplon* v. *United States,* 191 F.2d 749, 754-5 (C.A. D.C.).

This is not a case where all the "evidentiary facts" are undisputed and only the ultimate issue of the interpretation of the parties' intention as embodied in a written instrument remains in dispute. On the contrary credibility is definitely involved.[33] But even if there were no dispute on evidentiary facts, disposition by summary judgment would be inappropriate. As stated in *Stevens* v. *Howard D. Johnson Co.,* 181 F.2d 390, 393-4 (C.A. 4), in reversing a summary judgment:

> A number of questions arise, not only in connection with the breach of the contract, but also in connection with its proper interpretation and the damages recoverable for breach. These, however, should be decided in the light of the evidence which may be adduced upon a trial, not upon the affidavits

[33] For instance, the credibility of Mr. Dollar's testimony that he (who all his mature life has been a business executive dealing with enterprises of great financial magnitude and complexity) did not know the difference between a pledge of stock and a transfer of its ownership is certainly in issue (Ex. 2 to the Dollar request for admissions of fact, pp. 1176-7). And in *Dollar* v. *Land,* the Dollars attacked the credibility of the defendants' witness Laughlin, the counsel for the Maritime Commission in the stock transfer negotiations. Since credibility is in issue the case should not have been decided on motion for summary judgment. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 626-8; *Arnstein* v. *Porter,* 154 F. 2d 464, 469 (C.A. 2); *Colby* v. *Klune,* 178 F. 2d 872 (C.A. 2); *Firemen's Mut. Ins. Co.* v. *Aponaug Mfg. Co.,* 149 F. 2d 359 (C.A. 5).

> presented on a motion to dismiss. * * * even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment, * * * should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. * * * And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

This Court took the same position in *Detsch & Co.* v. *American Products Co.,* 152 F.2d 743 (C.A. 9). See also *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.,* 181 F.2d 341 (C.A. 5), and *Paul E. Hawkinson Co.* v. *Dennis,* 166 F.2d 61, 63 (C.A. 5), where contractual intent of the parties, deducible from inferences from undisputed facts, was involved.[34]

2. It was error for the court below to deprive appellant of the opportunity to make a new record on trial of the issue of title to the stock.

Judge Murphy conceded that appellant's complaint is sufficient on its face (R. 304). But he said in effect: "I will not allow the United States to prove that it owns the stock because (1) it is barred by collateral estoppel; (2) the issue has been adversely adjudicated in *Dollar* v. *Land;* and (3) Dollar counsel assures me

[34] Although *Fox* v. *Johnson & Wimsatt,* 127 F. 2d 729 (C.A. D.C.) contains language indicating the contrary, the real ground of that decision is that the facts alleged by plaintiff were insufficient as a matter of law. In any event, the District of Columbia Court of Appeals in its more recent decisions now follows the controlling attitude of the Supreme Court in restricting the use of summary judgment. See *Vale* v. *Bonnett,* 191 F. 2d 334 (C.A. D.C.).

in his affidavit "that no additional fact of any substance could possibly be presented in this action" (R. 288). The first and second grounds have already been disposed of above. We show here that Judge Murphy's reliance on Mr. Lasky's affidavit was equally misplaced.

We submit that it is highly anomalous on its face for a court to bar a litigant from attempting to prove an admittedly well-pleaded cause of action because, forsooth, opposing counsel, who has a direct and most substantial pecuniary interest in the outcome,[35] affirms that his opponent will not be able to produce any new evidence upon trial. Obviously such an affidavit should be viewed with the greatest reserve, to put it mildly. *Walling* v. *Fairmont Creamery Co.,* 139 F. 2d 318, 322 (C.A. 8). Apart from the obvious elements of bias and the inevitable tendency of counsel to view their own cases through rose-colored glasses, a mere glance through the incomplete printed record on appeal in *Dollar* v. *Land* makes it apparent that in a case as complex as this, involving complicated negotiations extending over years, with dozens of persons involved in one way or another and hundreds of documents, it is literally impossible for an attorney, no matter how competent and thorough, to *know* that no new evidence can possibly be presented. Disposing of litigation as important as this on such an affidavit is indeed "apt to be treacherous." *Eccles* v. *Peoples Bank of Lakewood Village,* 333 U.S. 426, 434. See also *Arnstein* v. *Porter,* 154 F. 2d 464, 471 (C.A. 2), stating: "It will not do,

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[35] Mr. Lasky admitted the obvious fact of his pecuniary interest in in the litigation. Transcript of hearing of March 28, 1951, p. 80.

in such a case, to say that, since the plaintiff * * * has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true." On motion for summary judgment "even evidence which is uncontradicted is not necessarily to be accepted as true." *Kasper* v. *Baron,* 191 F. 2d 737, 738 (C.A. 8). Actually, as we show below, Mr. Lasky's affidavit was false, for appellant *does* have substantial new evidence to offer at the trial of this case.

Mr. Lasky's affidavit was, therefore, an insufficient basis for granting summary judgment. See *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 620, 624-8, and *Colby* v. *Klune,* 178 F. 2d 872, 873 (C.A. 2), stating: "The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility." [36] It is therefore of no significance that appellant did not file a counter-affidavit, particularly since the complaint, which alleged that the true intent of the transfer of the stock certificates was to vest full title in the United States and that the United States was the true owner of the stock, was verified. *Albert Dickinson Co. v. Mellos Peanut Co.,* 179 F. 2d 265, 267-9 (C.A. 7); *Griffith* v. *William Penn Broadcasting Co.,* 4 F.R.D. 475, 477 (E.D. Pa.); *United States* v. *Newbury Mfg. Co.,* 1 F.R.D. 718 (D. Mass.); *Kent* v. *Hanlin,* 35 F. Supp. 836 (E.D. Pa.), where, as here, the pleadings raised an issue as to the ownership of stock. "* * * a defendant may not by motion for

[36] Mr. Lasky's affirmation that no new evidence could possibly exist is not a statement of "such facts as would be admissible in evidence," and hence did not meet the specific requirement of Rule 56(e), F.R.C.P.

summary judgment and supporting affidavits force a plaintiff to try by affidavits material issues of his claim of which he is otherwise entitled to trial." *Traylor* v. *Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (C.A. 8); *Chappell* v. *Goltsman*, 186 F. 2d 215, 218 (C.A. 5).

As this Court said in *Quon* v. *Niagara Fire Ins. Co.*, 190 F. 2d 757, 760 (C.A. 9):

> But the judgment of fact of one court on a particular record cannot bind another court, or even the same court, to make a similar finding on a different record. The imponderables such as credibility and inferences crowd upon one judging of facts.

Furthermore it would have been wholly unreasonable to expect Government counsel to submit, within the brief time contemplated by summary judgment procedure, an affidavit of inordinate length detailing new proof to be adduced at the trial and the issues to which it would be relevant. Such an affidavit would be as difficult and time-consuming to prepare as preparation for trial itself. Even if such an affidavit could have been submitted, Judge Murphy could not have analyzed the 2,100-page printed record plus such an affidavit with anything like the assurance which would be possible for a judge to whom such evidence would be submitted in a trial.[37] "For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a

[37] Significantly, the Dollars, in the presentation of their motion for summary judgment, made no effort whatever to inform Judge Murphy what facts the *Dollar* v. *Land* trial record demonstrates even from their point of view.

trial, he sees and hears the witnesses?'' *Colby* v. *Klune,* 178 F. 2d 872, 874 (C.A. 2).

3. The United States does have new evidence to produce on the trial of this case.

At the time the motion for summary judgment was argued before Judge Murphy and continuing up to the present, the Federal Bureau of Investigation has been conducting a comprehensive investigation of the facts bearing on the title issue. Accordingly, Government counsel informed both Judge Harris, on the motion for preliminary injunction, and Judge Murphy, on the motion for summary judgment, that the Government is prepared to offer on the trial of the case new evidence (not introduced in *Dollar* v. *Land*) showing that the Dollars intended to transfer outright title to the stock (R. 146; Memorandum of the United States in opposition to the motion for summary judgment, p. 27).

The following is an abbreviated statement of new evidence, largely brought to light after the hearing before Judge Murphy, which appellant will offer at the trial (and which Mr. Lasky swore did not exist):

(a) That the second account of the executors of the J. Harold Dollar estate, filed on January 31, 1939, listed the disputed stock as ''sold and accounted for herein''; and that the final account of distribution of assets of that estate did not include this stock.

(b) That in 1940 appellee Lorber, to justify the capital loss he took in his 1938 income tax return on the stock he transferred, had his bookkeeper, A. E. Lang, write the Bureau of Internal Revenue that the stock ''was unconditionally turned over to the Maritime Com-

mission * * * Taxpayer lost all right, title and interest in this stock in 1938."

(c) That Mortimer Fleishhacker, who transferred part of the stock in 1938 to the Commission and who was a predecessor in interest of R. Stanley Dollar as to certain shares of the stock, was allowed a capital loss he claimed only upon acceptance by the Bureau of Internal Revenue of his statement that he had surrendered all interest in the stock and a corroborating letter from the Maritime Commission that it received absolute title. That the same is true with respect to the tax return of the Dollar-Fleishhacker Trust.

(d) That Mortimer Fleishhacker in connection with his California State tax return submitted through his representative a statement to the tax authorities that "stock owned by the taxpayer was turned over to the Maritime Commission. The stock is still owned by the Commission."

(e) That the Robert Dollar Company in its California State tax return for 1938 claimed a loss from sale or exchange of its stock because it was "necessary to dispose of its investment in Dollar Steamship Lines stock."

(f) That although Sections 16 and 18 of the Delaware corporation law require that a transfer of shares as collateral shall be so stated in the stock transfer book and provide that the pledgor shall be entitled to vote the stock unless he, by entry on the corporation's books, expressly authorizes the pledgee to vote, no such entry of pledge of this stock was made in American President Lines' books, yet the Maritime Commission for years

voted the stock without any objection by the Dollars.

(g) That Keith R. Ferguson, executor of the J. Harold Dollar Estate and counsel for the Dollars at the closing of the stock transfer agreement, gave sworn testimony in the probate proceedings of that estate in Marin County, California, describing the disputed stock as that of "the steamship line we do not have any more."

(h) That H. Scott Dunham, who testified for the Dollars in the District Court of Columbia trial that a statement by him that the stock was "charged to income for the year 1938 upon the release to the United States Maritime Commission of the shares previously owned" really meant only that the stock was worthless, testified otherwise in the probate proceedings in Marin County, California, on February 23, 1939, that as a result of that same transaction "at the present time the estate has no stock."

(i) That contrary to the testimony of R. Stanley Dollar in the District of Columbia trial that he first learned on July 23, 1945, that American President Lines had discharged its 1938 debt to the Maritime Commission, the 1943 annual report to the stockholders of the American President Lines, of whom R. Stanley Dollar was one,[38] informed him that this debt had been entirely repaid.

(j) As new proof that the "pledge" theory of the Dollar defendants was first conceived about 1945, plaintiff will prove press publications in San Francisco and

[38] Mr. Dollar has throughout owned certain stock of American President Lines not involved in this litigation.

other cities of an offer by the Maritime Commission to sell this stock in 1943 and that the Dollar defendants made no protest of such proposed sale.

(k) That news articles in the San Francisco press stating acquisition of ownership by the United States of the stock in controversy appeared on August 21, August 23, September 7, September 20, September 27, September 28, October 5, October 10, October 11 and October 28, 1938. Plaintiff will examine the Dollar defendants to determine whether or not they, as regular readers of the San Francisco papers, did not read these news articles, although they made no protest at the time refuting the statements that the Government was acquiring ownership of the stock.

(l) That in audit reports of the Maritime Commission, some of which were transmitted to Congress, the transferred stock was shown as an asset of the Government.[39]

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[39] In this connection we shall show that the District of Columbia Court of Appeals was in error in the statements in its opinion on the contempt order as to the non-recognition of American President Lines as a corporation in which the United States has a proprietary interest. *Sawyer* v. *Dollar,* 190 F. 2d 623, 643 (C.A. D.C.). Contrary to the inexplicable statement of that court, Senate Document 227, 78th Cong., 2d sess., p. 21, *did* list American President Lines as a corporation in which the Government may have a proprietary interest and referred to the acquisition of the stock by the Commission. This was repeated in the General Accounting Office Reference Manual of Government Corporations as of June 30, 1945 (Sen. Doc. 86, 79th Cong., 1st sess.), pp. vii-xii, 1-2.

31 U.S.C. 856, which lists "mixed-ownership Government corporations," is confined to corporations which perform a governmental function, such as the federal land banks and the Federal Deposit Insurance Corporation. It does not include any of the 11 "corporations created privately or quasi privately in which the government may have a proprietary interest" listed in Senate

The United States plainly has the right to an independent judgment by the courts of this circuit on the issue of ownership of the stock, based on the new record which we will make on the trial of this action. See the authorities cited above and *Smith* v. *Hall,* 301 U.S. 216, 218, 233, where the Supreme Court, after having held a patent valid in the patentee's prior suit for infringement, reversed itself and held the patent invalid, on the basis of a different record made in the patentee's second suit for infringement. Judge Murphy's denial of the Government's right to make a new record was therefore error.

In conclusion, this case is one singularly inappropriate for summary judgment. It involves complex issues of public importance. See *Pacific American Fisheries, Inc.* v. *Mullaney,* 191 F. 2d 137, 141 (C.A. 9). A substantial issue of fact as to the intent of the stock transfer transaction is involved, as are questions of credibility of witnesses. The adverse decision in *Dollar* v. *Land* may not be used to deprive the United States of an opportunity to make a new record on trial, which it is prepared to do. The United States is entitled to have the independent judgment of the courts of this circuit as to the nature of the stock transfer.

Document 227, *supra,* of which American President Lines is one. Since American President Lines does not itself perform a governmental function, the fact that it is not listed in 31 U.S.C. 856 is no indication that Congress does not recognize that the Government owns this American President Lines stock.

CONCLUSION

The United States is not bound by the judgment in *Dollar* v. *Land*. It is entitled to its own trial of the issue of ownership of the stock in the action here, on a new record. It is entitled to the independent judgment of the courts of this circuit on that issue.

The summary judgment entered by Judge Murphy deprived the United States of those rights. It should, therefore, be reversed.

Respectfully submitted,

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